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A Model of Rights

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Abstract

This paper articulates a model of rights. It starts from three simple intuitions about what rights are. First, rights protect an *interest*, that is, something that we value. For example, the right to life protects life, which seems to be obviously valuable. Second, rights are able to protect values because rights impose *constraints* on the actions of others; in other words, they generate duties. My right to life implies that others may not take or deliberately endanger my life. This second element already implies a third element: that rights arise in *relations* between people. The model that I set out takes up these three intuitions and hence encompasses three elements: the protection of value, the imposition of constraint, and the situation of rights in relations.

The paper proceeds in five stages. First, I address some preliminary questions about the idea of a model of rights as I am using it (1). I then define and describe the elements of value and constraint (2). In the third part I claim that the elements of value and constraint are individually and jointly necessary to a model of rights (3). In the fourth part I establish that constraint and interests are, although jointly necessary, not jointly sufficient to the model of rights, and argue that the element of relational context is necessary to fulfill the conditions of the model (4). In the final section I consider some objections to relationality as an element of rights and conclude (5).

Keywords

Rights, Concept of Rights, Moral Rights, Legal Rights.

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This paper articulates a model of rights. It starts from three simple intuitions about what rights are. First, rights protect an *interest*, that is, something that we value. For example, the right to life protects life, which seems to be obviously valuable. Second, rights are able to protect values because rights impose *constraints* on the actions of others; in other words, they generate duties. My right to life implies that others may not take or deliberately endanger my life. This second element already implies a third element: that rights arise in *relations* between people. It makes little sense to invoke a right when one is alone, as one would only be addressing oneself. The model that I will set out takes up these three intuitions and hence encompasses three elements: the protection of value, the imposition of constraint, and the situation of rights in relations.

There are already many theories about rights. Some focus on articulating the first intuition, namely that rights protect something of value to us. Others elaborate on the second intuition, about the constraining effects of rights. What is less clear in the existing literature is how we should think about the relationship between the two elements of value and constraint. One purpose of the present paper is therefore to clarify this relationship. In particular, I will argue against a tendency of some authors to privilege one of the two elements, and even to argue that the respective other element is not an integral element of rights at all.

I will argue that relationality is a constitutive feature of rights in that rights describe the duties of *particular* groups of people with respect to the interests of other *particular* groups of people. What kind of duty I have with respect to your interest in say, health, will depend on my relationship to you – on whether I'm your doctor, a family member, or a state official. With regard to one and the same interest, rights can thus generate different constraints depending on relationality. The element of relational context thus informs the shape constraints take: must I refrain from interference in your enjoyment of some interest? Must I *also* protect your enjoyment of that interest against intrusions by others? Must I find ways of *promoting* the interest? If we do not include the element of relationality in a model of rights, in short, we underspecify, or underdetermine, what rights are.

The paper proceeds in five stages. First, I address some preliminary questions about the idea of a model of rights as I am using it (1). I then define and describe the elements of value and constraint (2). In the third part I claim that the elements of value and constraint are individually and jointly necessary to a model of rights (3). In the fourth part I establish that constraint and interests are, although jointly necessary, not jointly sufficient to the model of rights, and argue that the element of relational context is necessary to fulfill the conditions of the model (4). In the final section I consider some objections to relationality as an element of rights and conclude (5).

1 – What Is A Model of Rights? Some Preliminary Matters

A model of rights is a conceptual account. Rights are a normative idea, though, so they cannot be fully defined or described in an entirely analytical or conceptual sense. But we can abstract as far as possible from the substantive normative domains in which they operate, namely, law and morality. Since much of what is important about rights concerns their normative content, and the role they play in the normative system in which they operate, an account of rights that says only very little about these normative matters will necessarily be a fairly thin one. I will not, in other words, attempt to resolve all the difficult normative questions involved in rights analysis and adjudication by conceptual fiat. Nonetheless, I think we can usefully say some important things about rights that will involve both their analytical content and have some minimal implications about their normative function and status. This brings me to the second preliminary point: is this a model of legal rights or of moral ones?

It has become commonplace, when discussing *specific, concrete* rights, to think of legal and moral rights as being different kinds of things, so that one can argue for a particular right in one context without that argument necessarily having any purchase in the other context (this is largely a result of the influence of legal positivism). But since law and morality are both normative domains –

albeit offering different kinds of norms, at least for legal positivists – then there is no reason in principle why a model of rights that accounts for their normativity but does not purport to identify *which* interests they ought to protect or, put in the more prevailing terms, *which* rights we ought to have, cannot function for both.

I offer a model of rights, then, that describes the constitutive features of rights in both morality and law. The *kind* of normative force they have, in terms of the *effects* of their entitlements and obligations, will vary according to the domain in question – so a moral right will create or reflect moral norms while a legal right will create or reflect legal ones. This is unproblematic as long as we don't think of the specific actions associated with the enforcement of rights, or their other knock-on effects, as being part of what they are, part of the nature of rights. Moral and legal 'enforcement' of rights will be different, but both are in principle possible. A claim based on a moral right will be different from a claim based on a legal one, but the basic underlying structure that is the right need not be different between the two normative domains.

The final point concerns fulfillment conditions, or how to judge our success in outlining the model: what would a good model of rights look like? The criteria for a model of rights as I set it out in the paper is as follows. The model must be useful at the two main stages of rights practice, namely, first, for recognizing (moral) or imposing (legal) ones, and, second, for understanding existing rights. We are sometimes called upon to recognize that there is a moral right in some situation, or to impose a legal right. When we do so we must have, in the background, some notion about the kind of thing a right is, or we will go astray from the start.

That basic idea about what a right is will also inform our interpretation of some existing right; to allow us to see fully what has gone into its creation or recognition, since, when we interpret existing rights, we do so partly against the background of the kind of thing rights are – with a model of them, in other words, in mind. When I see that you have a right to property, the model of rights ought to tell me what kinds of considerations – and, in particular, what kinds of normative judgments – have gone into identifying or imposing that right. So a model that can make little sense of some right – that cannot help us to interpret existing rights or to tell us what kinds of questions we need to answer in establishing new ones – is not a good model.

This condition is important because much of what we do in practicing rights (here I include moral and political philosophers as well as those who work in one way or another with legal rights) is to make claims about new rights based on ones we already acknowledge. So an argument for a new right is often partly based on the fact of some existing one in circumstances that seem relevantly similar. We often see arguments to the effect that some bearer of a duty in relation to some right – say, the state's duty to provide policing in relation to our physical security – ought also to bear a duty in relation to some new right – in, say, anti-discrimination, and the argument for the new duty will often refer to the older one for justification.

2 – Value and Constraint as Elements of Rights

a. Interest Theories and Consequentialist Accounts of Rights

Rights protect something of value. As I said, this is a simple and intuitive statement, but in rights theory it is nonetheless controversial. There are two significant groups of rights theories that rely on the intuitiveness of the statement and emphasize the value-protecting dimension of rights. These are consequentialist accounts of rights and interest theories of them. The crucial difference between the two is that while interest theorists take themselves to be describing rights as morally fundamental, consequentialists describe and defend rights in instrumental terms, as usefully promoting whatever their theory of valuable consequences sets out to be most important, morally speaking.

Consequentialist theories of rights find an early exponent in John Stuart Mill,¹ and more contemporary ones in Sumner,² for example, and Talbott. There are a number of versions of the interest theory of rights, but the most well known is that of Joseph Raz, who says that a right is an

¹ Mill, *Utilitarianism*

² Note to Lawrence Sumner

aspect of X's well-being, where X is itself intrinsically valuable.³ Another more common way of putting this idea is to say that rights protect interests that are sufficiently morally important to ground duties.⁴ These theories take rights to be important because of the importance of the thing that they protect. Let us call this element of rights the *victim* side, since it refers to the value of the thing of value for the person protected by it. A right to life, then, reflects and protects the moral significance of life; the right to vote protects the importance of the franchise, and so on. Arguments for rights made along these lines go something like this: [something obviously important] ought to be protected by a right – if there is no right to [this thing] then rights don't mean anything at all. So, for example, someone might say, there is a right to food because food is necessary to human life; by putting its emphasis on the importance of the thing the right will protect, this type of argument can therefore make assertions about rights without being restricted by the conventionally important distinction between negative rights (to be guarded against some type of intrusion or interference) and positive ones (to be granted some important good).

Consequentialists who defend rights do so by referring to the importance of whatever value they take to be morally important, arguing that rights frameworks are effective in promoting that value. Talbott, for instance, takes autonomy to be central to the ultimate value necessary to human wellbeing, and argues that the rights that should be universal are the ones that best promote human autonomy.⁵ Interest theorists, by contrast, view rights as directly, as opposed to contingently, reflecting and protecting interests that are fundamentally important, morally speaking. But despite this difference, both types of theory put their emphasis on the victim side of the rights equation: a right to life is not morally justified by reference to the moral requirement of *respect* for life, but is regarded as morally important on account of the intrinsic value of life, and therefore *justifying* that respect and the constraint on action it involves, because of the moral importance – the value we accord to – human life.

b. Deontological Theories

Rights involve constraints.⁶ As in the case of rights and interests, this statement is both intuitive (from a non-specialist point of view) and highly controversial (from within rights theory). After all, what would be the point of rights if all they did was to *articulate* important interests? Surely what makes rights different from mere statements to the effect that some things are important, or that one ought or ought not to do certain things, is that rights – as distinct from such statements – give us distinctive reasons to act, have some effect in the world that mere statements do not have. By 'constraint' here, I mean simply something that restricts the choices one can make. It must be contrasted with the idea of a 'restraint', with which we might easily confuse it given that many people think of rights primarily in terms only of limiting actions. Constraint, in other words, can both limit and require action; either way, as I use it here I mean only the sense in which a constraint *narrows the range of permissible options* available.

Interest theories and consequentialist accounts of rights both take it to be true that rights *involve* constraints: interest theorists think that rights *justify* the imposition of such constraints (in the form of moral obligations), while consequentialists who accept rights frameworks on instrumental grounds also view respect for rights as morally required, because rights have been established, as rules, to promote the good.

But some theorists of rights, and of morality more generally, think that rights *are* constraints. Kant uses the word 'rights', for example, to refer only to juridical rights, which he takes to protect equality of 'external freedom'. On this view, rights reflect the equal moral status of persons; they

³ Raz, *The Morality of Freedom*; other important advocates of the interest theory include Neil McCormack, *Rights in Legislation* and Matthew Kramer, "Rights Without Trimmings," in *A Debate Over Rights*.

⁴ Ibid., page ...

⁵ William Talbott, *Which Rights Should be Universal?*

⁶ These constraints will be normative ones, although the type of normativity they generate will differ depending on the domain in which we find them: moral rights will be, or will reflect, or generate (depending on one's view of them) moral constraints, while legal rights will have a parallel relation to legal constraints.

limit freedom of action on account of the equal freedom of others. The idea or concept of what they are reflects only this norm of equal freedom, and thus they are not understood to protect any aspect of well-being.

The form of rights (constraint), in this type of theory, is taken to exhaust, or to be synonymous with, their function: the norm that gives rise to rights, in other words, equal freedom, also exhausts what they are taken to protect. So their content is derived from their form. Therefore I henceforth refer to these theories that protect equal moral status as formal or constraint-based. Various iterations of such formal or status-based accounts of rights emphasize different aspects of rights; Kant's is the most clearly formal, since he derives the content of the juridical rights he describes *from* this norm of equal freedom. Nozick employs a constraint-based view of rights but stipulates that he takes them to protect the rights in person and property that Locke suggests pre-political ones do.⁷ Dworkin's account of rights as 'trumps' is a constraint-based view insofar as it takes rights to limit the types of reasons one can rely on in political decision making.⁸

3 – Against Exclusivity: the *Joint Necessity of Value and Constraint*

When I said that a right protects something of value, I was simply trying to describe rights in a way that would reflect our common sense intuitions and be as uncontroversial as possible. But of course, the debate about what rights are is so longstanding and so complex that it is now virtually impossible to say anything uncontroversial about them. Still, it seems to me that such a simple formulation resonates with most people as saying something that is basically correct. In order to describe and defend my model of rights, I want to rely on the simplicity and intuitive correctness of that first statement. At the same time, I outline the contours of my model in comparison with the existing accounts of rights by pointing to the ways in which that statement might nonetheless be taken as controversial.

The core of my argument in this part of the paper is that a right necessarily involves both a constraint and something of value. So when I say 'a right *protects* something of *value*,' what is important for my purpose is that the right involves two aspects – that of the constraint on action involved in the element of protection, and that of the interest involved in the element of value. What I want to establish here is simply that to use the language of rights, to claim, assign, recognize or describe a right, one necessarily invokes both the concept of constraint and that of value; virtually all theories of rights emphasize one or the other of these elements in some way, and some accounts clearly, if implicitly, rely on both. My point here is therefore a simple and modest one, and it is only that while differing theories of rights will interpret the relationship between these two elements differently, neither is dispensable to an adequate theory of rights; both must be recognized and made explicit.

a. The Necessity of Constraint

What does the element of constraint mean? It means that rights comprise constraints as well as articulating certain interests as normatively important in the given domain. It means that violating an

⁷ The content of these Nozickean rights, though, map onto the Kantian juridical ones fairly closely.

⁸ Dworkin's is a theory about rights of a particular type, namely, constitutional ones. Kant's and Nozick's vision of rights, while highly influential in both rights- and moral theory, are not intended to be theories of rights in the sense of being focused on the concept of them. The will or choice theories of rights, on the other hand, do have this kind of conceptual aim⁸. These theories share the Kantian normative focus on agency, and, like the Nozickean account of them, view rights as constraints on action, but they emphasize the power they confer on the right-holder. They are understood to protect a domain of choice for those who hold them, and are thus constituted by a set of powers of waiver and enforcement. So a right exists, on this type of view, where someone has the relevant set of powers in relation to a duty. Whether this duty is defined by some independent norm or by reference to the form of rights (and thus reflecting the broadly Kantian content) is a matter of difference among these theories; theories of both types emphasize the powers of the right-holder, so that the constraint – its existence and its enforcement – is controlled by him or her.

interest is wrong in itself (legally or morally) in a fundamental way that is not captured by either the consequentialist view, or the interest-based view. The element of constraint helps us to make sense of both the demandingness or the peremptoriness and directedness. The peremptoriness of the reasons associated with rights is often described by reference to the way that having a duty in virtue of a right makes that duty directed to the right-holder. It imbues the right holder, in particular, with an entitlement in relation to the duty. The example that is often used to illustrate this point refers to the difference between an obligation or duty to give to charity and an obligation or duty that one may have in virtue of a right. Although the duty-holder may experience both obligations as equally important, there is a kind of priority associated with the right that is reflected in its enforceability. It is this presumptive priority associated with the directed obligations embodied by rights that gives them their anti-maximizing character, because they are meant to indicate a certain *prima facie* inviolability of interests against infringement from the actions certain others might otherwise take in pursuit of their goals and desires.

The interest view fails to capture this fundamental constraint because of the problem of allowing for trade-offs and aggregation. If rights simply identify interests that have been ascribed as having paramount importance, nothing would in principle prevent us from taking that to require maximizing the protection of those interests. If all rights do is to articulate certain interests that are especially morally important, then we could simply take them to mean that we ought to act in furtherance of that interest. The importance of some interest to a particular individual, on this way of understanding what rights do, could become less important if the important interest could be better promoted in some way that protects the interest on behalf of some people but not others.

This seems implausible as an account of rights, which we ordinarily take to have some particular and distinctive orientation toward individuals. The idea of constraint as a constitutive feature of rights, then, means that rights must be understood as creating constraints in virtue of the interest involved with respect to every individual to whom they apply. The fact that rights take this constraining form means that there is an intrinsic connection between the interest articulated as generally important, by its ascription as a right, and the individual to whom the right applies. Whatever we think its special importance consists in, this connection between *my* interest in life, and the general importance of the interest in life means that including the element of constraint in a model of what rights are blocks us from using their articulation of important interests to justify trading off particular individuals' interests for the sake of the greater promotion of that interest elsewhere.

b. The Necessity of Value

Although the interest theory of rights is perhaps the most widely used in rights practice, within rights theory the fact of rights' characteristic constraining features of directedness, together with a certain priority, has led to several theories that purport to be exclusively formal or constraint-based. Here I argue briefly for the implausibility of such theories, based on the importance of valuable interests to any given right.

Any account of rights must acknowledge an element of value. This is not to suggest that formalistic or rule-based views of rights are thereby *incoherent*. All I mean to establish is that an account of rights cannot be formal *all the way down*, as it were.

This claim can be made out by considering that each of even the most formalistic theories of rights point to two dimensions of value. The first is simply the value associated with the object of rights-protection according to such theories, namely, individual inviolability; the second is the prioritization of certain interests over others. These theories allow that there is a set of interests that are eligible candidates for protection as rights. This set of interests is selected for protection because they are *valuable* in some way. Even if a formalistic theorist would argue that such interests are derived from the constraint-based rule-structure, that simply means that the interests thus derived are considered important *to* the animating value of persons and their inviolability. The first element of value implicit in formalistic theories of rights, then, is the answer to the question of *why* we build a rule system around people's moral inviolability – why, in other words, we *make* people morally and legally inviolable. There must be a reason for this construction, otherwise it would simply be empty rule-following. The reason is that inviolability protects the value of persons; but the question remains

of how to protect persons – or, to put the question differently, in which respects persons are inviolable. The particular interests protected by rights, on the formalistic views of them, are the ones judged most important to the protection of persons as inviolable.

4 – The Joint Insufficiency of Value *and* Constraint – Introducing the Relational Element

So far I hope to have been persuasive about the joint necessity of the widely recognized elements of constraint and value to a model of rights. In this section I argue that rights also involve a third element in addition to those two. The core of my argument for this third element is as follows. Including constraint and the importance of certain interests in a model of rights does not yet sufficiently account for them. The content of any given right will be underdetermined if it is recognized or imposed *only* on the basis of an understanding of rights as involving constraints justified by reference to the importance of particular interests.

My argument is that every right involves not only normative judgments about the importance of interests, and of protecting those interests via the constraining form of rights, but that a right *also* reflect judgments about the normative standing and content of the relations in which it arises. I say more about the implications of this conclusion a little later; I here lay out my argument for the conceptual importance of the relational element to rights, and thus for the inclusion of such an element in the model.

Focusing attention on the substantive (ie. non-formal) content of the term ‘right,’ the objection to the duty-correlate account of rights leads to the insight that rights must protect something substantive. The most compelling account of what that something is is that of Joseph Raz, outlined in (2), namely, that rights protect some interests individuals have that are especially valuable. According to Raz’s version of this ‘interest theory’, we can understand and describe a right independently and antecedently to any duties or constraints it might require. Rights just *are* particularly important interests, on this view, and they have an exclusively justificatory relationship with duties. Waldron’s formulation of the view clarifies this point: rights, he says, are the ‘way interests generate duties.’ This makes it seem that rights can be understood as instrumental to furthering certain interests whose importance warrants requiring things of people in relation to them.

This theory of rights has become popular, but it is also acknowledged to suffer from the flaw I described in section (3). That problem can be summarized briefly as follows. Rights and duties exist and function in the service of important interests. The interest in practicing one’s religion, in a right like that of freedom of religion, for example, does all the normative work in recognizing or imposing the right. But this explication of what rights are does not account for one feature that seems to be central to rights in the way we ordinarily use them and talk about their role, namely, as blocks or restrictions on consequentialist reasoning. There is nothing intrinsic in what a right is, according to this model, that would necessarily block duties being assigned to promote the interest in question – say, in the practice of religion – that allowed for the trading off of some people’s interest in that practice against that of others.

One could articulate this objection by reference to something like the orientation of rights to individuals, and thus requiring that they be sensitive to the separateness of persons. Or one could articulate the objection by referring to some notion of equality – so that, for example, one might say that the very idea of rights suggests that, if there is to be a right to practice one’s religion, then all individuals who have that right must have it to the same extent, so that some people’s religious practice is not protected more than that of others. Whichever way one articulates the objection, though, the version of the interest theory that understands rights to stand *only* in a justificatory relation to duties seems vulnerable to this concern about the possibility of a collapse into consequentialism that rights ought to block.

One refinement of the interest theory of rights, set out by Matthew Kramer, appears responsive to this objection: Kramer’s view⁹ introduced the idea that rights stand in relation to duties not only in the justificatory sense but also by entailment. On this view, the logical and intuitive

⁹ “Rights Without Trimmings,” *supra* at note 1.

relation of rights to duties is preserved by the claim that rights entail the duties they ground. The significance of this maneuver is that one cannot, on this version of the theory, have a right at all in any meaningful sense if there is no identifiable duty that corresponds to it. So here we have an account of rights that appears to recognize the two elements of constraint and interest that I asserted are both integral to them. Yet, still, the model is so far inadequate.

The model as so far articulated still both underspecifies and inadequately explains what any right is. Even if we take rights to entail constraints, the theory explains or makes sense of any right, normatively speaking, *only* in terms of the importance of interest that constraint protects. The interest, once defined, can only be evaluated along the valence of more and less important (morally or legally).

Yet we have rights (and the constraints they involve) that protect the same interest – in the practice of religion, say, or in the free practice of religion – that are complexly differentiated in different relational contexts. My right in respect of my freedom of religion will be different in relation to my government, my neighbor, my school, my parents, and my children. The content of those different rights, and the different duties they involve, is not fully specified or explained according to the idea of *more* and *less*, which is the evaluative valence of the importance of interests. The refined interest theory would explain all those rights by reference to the importance of my interest in freedom of religion. But the general importance of individual interests is insufficient to this task. It makes no sense to say that the interest, once defined as important by its ascription as a right, is then for some reason *less* or *more important* in these different settings: if an interest in an individual's practice of religion is important, then that importance ought to generate whatever constraint its importance justifies on everyone.

Rights that protect the same interest will, however, be different across different relational contexts. I argue that the content of the entitlement and obligation will reflect both the interest *and the relational context*. Think, for example, of the interest we have in our physical bodies. It will give rise to rights of varying types of requirements depending on the relational context at issue: our right to physical integrity vis-à-vis the state is different from our right vis-à-vis our neighbors or vis-à-vis our parents, children, or other family members. A child's right to education, similarly, will likely create constraints on the state, on her parents, on her teachers, possibly even on her neighbors. So much is already explicable by the fact that the interest in education is important enough to warrant constraining freedom. Yet the shape that these constraints take will differ across the various relational settings.

The differentiation among the various instantiations of these rights in different relational contexts can, according to a model of rights including only interest and constraint, thus appear somewhat arbitrary, or at least external to the right itself. Physical integrity, health, religion, expression, property, are all interests that are important enough to be almost universally protected as (in these cases both moral and legal) rights; yet the actual content of the entitlements they endow and the shape of the constraints they involve can justifiably vary across different relational contexts. This variation cannot be explained by referring to the greater or lesser importance of the interest itself.

Since the importance of interests is doing all the normative work in a model of rights including only constraint and interest, any explanation of variation in the shape of constraints must refer to the normative importance of the interest – but it cannot do so, because the valence on which we can evaluate an interest is binary: its importance can only be greater or lesser. But the differences in the actual content of rights across various relational settings is nuanced and cannot be explained only by reference to this binary valence of more or less. Education is undoubtedly an important interest of everyone, but that cannot explain why parents have a substantially more complex set of constraints in virtue of that interest than neighbors do, or why the state has, again, yet a different set of constraints on its actions in virtue of the same interest.

The particular rights people have against particular other people cannot, as *rights*, be specified or explained only by reference to the importance of interests that involve constraints. Specifying these rights will also implicate a normative judgment about the relationship between the rights claimant and the addressee. A given right, in other words, comprises two types of normative considerations: an evaluation of the importance of an interest, and an evaluation of the relational context.

So, in the case of the right to health, with this model in mind we can now answer the question about what *kind* of constraint exists in virtue of the importance of the interest in health, because the

right will involve a recognition that the relation in which I stand to you matters to the way in which I ought to constraint my behavior in virtue of the importance of health to you.

If I stand entirely apart from you – if I live in a different country, we have never met, we have no goods in common, and we have no social or personal connections – then there will be no relational feature that connects us in respect of your interest in health. I therefore have no constraints on my action in respect of that interest; but this is only true until I do something that creates a risk to your health, or to your interest in health. If I do that (whatever that might be) then we are connected by the risk that my action creates to your health. Now the particular relational norm that governs risk, as a relational feature, might be subject to disagreement. But one plausible candidate is the norm of equal respect. The constraint in virtue of which I must act, in that setting, in relation to your interest in health, will reflect the norm of equal respect. So the right to health will be specified not only by the normative importance of the interest, but by the norms required by the relation in which I stand to you.

If I am your neighbor, for example, then I stand in a particular relation to you even apart from any risk to your interests I might create. These relational features could be physical proximity and some shared community. And we might think that these relational features generate no norms at all, in which case the right to health would impose constraints on a neighbor in relation to my health that would take the same shape as that in the stranger context.

If I am your government, though, we will have to identify the major features of our relation. We might say that the relational features of an individual's relation to their state involves not only the potential for risk (as in all relations) but also a special kind of power because of the state's coercive capacity, a particular normative dependency on the state because of its role in guaranteeing our obligations to one another, and the state's control over certain dignitary interests because of its regulation of the status of individuals.

Different relational structures give rise to (are governed by) different norms. Those norms will not always determine which interests are to be protected within that relationship, but if we think there is to be a right, so that the interest *is* protected, then the normative content of the relationship will affect the way the interest will be protected, and thus what the actual right involved will be.

I have been talking as though it is clear which relational features will give rise to which constraints, and thus to which rights. But of course this is not the case. The norms that govern different types of relationships, or of relational contexts, will be a matter for further judgment. But this does not preclude the inclusion of this element in a model of rights any more than including interests in it does, since the fact that an interest is necessary to a model of rights does not, similarly, tell us *which* interests rights will protect, only that, in recognizing or imposing rights, we will need to make a normative judgment about the relative importance of interests. The relational element, similarly, will require that we consider the norms associated with certain relational features as part of our assessment of whether a given right exists or not, or whether one ought to be imposed or not. It also gives us a more nuanced and accurate way of interpreting existing rights, since it allows us to see what the normative judgments are that have gone into the recognition of a right, and to evaluate them.

It does seem clear, though, that, as in the case of risk, rights *tend* to be recognized in the context of certain kinds of relational settings, and in those settings, to be governed by certain types of norms. I make no attempt, here, to spell out or to judge these various possibilities, but just to indicate how the model I propose would work, I briefly sketch what the relational features are that seem relevant, and what the norms are that they give rise to. The definition and implications of any of these is debatable, and the list is not supposed to be exhaustive. Moreover, in most relationships, particularly the 'thick' ones associated with partiality, these features will overlap and come together. None of this, it seems to me, obviates the fact that these are the features underlying our relational judgments in rights settings, or the need to clarify the norms associated with these features.

One important type of relationality involves *Positional* features. These might include risk (threatened setback to interest), power (control over others' goods), and dependency (need/vulnerability + control over good or interest needed or at risk). These positional relational contexts are governed by norms of equal respect, since they attract our concern about people treating others as means in settings where they have certain kinds of power over them, or failing to adequately consider their moral status as equal in circumstances of risk. Other types of relationality involve the

affective features of care and trust, which might be taken to give rise to norms of concern, generating positive constraints to promote the other person's wellbeing to some extent. Still others might be certain *normative* features, such as having authority over someone, being a guarantor of their entitlements against one another, and having control over their status relative to one another, which might be taken to give rise to the kinds of dignitary protections associated with anti-discrimination norms and procedural norms. Sharing common goods or common benefits might give rise specifically to norms of fairplay and reciprocity, and having a relationship involving *representation* might give rise to norms involving taking a neutral outlook on the represented party's beliefs and desires, as well as certain obligations to accuracy and impartiality.

A model of rights that includes this third element, then, can make sense not only of the fact that rights protect some interests but not others, but also of the differentiation among rights in different relational contexts. Moreover, it means that in interpreting what any given right is – which we would do, for example, if we wanted to extrapolate a right from one context to another – will involve considering the normative importance ascribed to the interest specified by the right as well as that of the right's relational setting. The final implication of this conclusion is that when someone claims some right, we ought to take them to be asserting three things, and we should respond to their claims according to our view about all three:

- (i) the importance of some interest of theirs
- (ii) that the particular person against whom they make the rights claim is obliged to constrain their conduct in some way because of
- (iii) that that behavioral constraint ought to take a particular character, based on the norms governing the context of the relationship in which they stand to the claim-ee

5 – Justifying the Relational Model

Here I briefly indicate a few possible objections to the model I have proposed and sketch a possible line of response to each.

First, we might object that this differentiation between rights in various relational contexts is based on normative considerations that are relational but that are entirely external to the right in question. So the content given to the duty of parents to educate children is part of the relation between parents and children, rather than responding to the individual rights of persons to be educated. The problem with this objection is that on this way of thinking there would be no space left for the idea of rights at all: all obligations would simply be products of relationships. The idea here is rather that within rights, relational features titrate the extent of an interest protected and shape the constraint involved in certain ways. Although we can know what interest is protected by a given right outside the context of relationality, and thus that a normative judgment has been made about the importance of that interest, the right is underdetermined unless we also know something about the relational setting of the right and the constraint it involves.

Second, we might think that these rights are differentiated not on the basis of relationships but on the basis of some other feature, such as voluntary undertakings of responsibility. Yet we can have different rights in respect of the same interest among various relational contexts in which none of the obligations are undertaken voluntarily. The distinctive rights that arise within political relationships, for example, do not necessarily involve voluntary undertakings, and yet both citizens in respect of fellow citizens and in respect of their state itself have particular rights in those contexts. Power, also, is not always voluntarily acquired and yet can give rise to special kinds of scrutiny over actions. Relationality among neighbors arising from proximity need not be voluntary, but the risk arising from conduct in such situations will nonetheless give rise to rights. One can voluntarily engage in risky conduct without voluntarily undertaking to conduct oneself with reasonable care or consideration of others – yet we still expect that of everyone in such situations.

Third, one could object that this model does not make sense of our most basic intuitions about our most important rights, namely, the ones that we must have against every other human being if the idea of rights is to mean anything. This objection assumes what it means to assert about rights – that relationality does not matter. What this way of thinking fails to account for is that relationality can be,

among other things, thick or thin. Yet I take this to be an important objection, and one that can illuminate and further clarify the model, and so I will address it in some detail.

Rights, I have claimed, entail constraints. A constraint is something that can meaningfully limit the range of options available. Of course any reason for action *can* limit the range of options available to one, depending on one's motivation to act on the reason, and on the type of reason it is. Part of what characterizes a right as a constraint is that it takes a certain priority among other types of reasons. So part of what a right *is*, then, involves the prioritization it has as a reason.

Moreover, rights violations often attract sanctions of some kind – stronger assignment of blameworthiness, demands for apology or compensation, interpersonal censure, social condemnation or even exclusion, in the case of moral rights and the obvious sanctions associated with legal ones. I do not claim here that the presence or effectuation of these sanctions is somehow necessary to the existence of a right, but rather that these types of sanctions often arise in response to rights violations in a way that they do not arise as consistently or as forcefully in response to violations of non-directed duties of, say, charity or beneficence.

The presumptive priority of rights as reasons, together with the other, ancillary reasons generated by the social pressures associated with sanctions for violation, mean that it makes sense to think of rights as *meaningfully* or *materially* limiting the range of options available to a person rather than simply nominally or theoretically doing so. This means that it makes more sense to talk about *rights*, as distinct from more general moral or social pressures, in circumstances where a particular set of options are in view, and where the fact of the right has a clearly identifiable limiting effect on that set.

Now examine the claim that rights arise in circumstances of relationality which, at its thinnest, involves risk. The counterexample, I take it, that motivates the intuitive objection that rights are supposed to be *non-relational*, is that all persons have certain rights against all other persons, so that it makes no sense to think of those rights as *arising* at all. There is never a time, this objection says, when we do *not* have the negative, background rights to various kinds of freedoms and to personal security and bodily integrity against *every* other person. That, the idea says, is what makes these rights universal and it is what makes them so important.

But if we take my claim about the constraining character of rights to require that they meaningfully (substantially or materially) limit the range of options available to an actor, then the idea of some person in France having even a negative right against me in any meaningful sense, at this moment, seems a bit artificial. Sitting here at my desk, there is very little sense in which the negative rights of billions of people have *any* constraining effect on my range of options at this moment, or at any seriously foreseeable time. Of course this cannot imply that none of those people have *any* rights against me at all, so this seems to present a puzzle.

The solution to the puzzle, it seems to me, is to take a particular relational dynamic, namely, risk, to be one of the necessary conditions that give rise to rights (the other being some sufficiently important interest that is threatened by the fact of the risk). On this interpretation, we would say that any person (call her A) has a negative right against any other person (B) when B takes some action that creates a risk to one of A's (sufficiently important) interests. Prior to the fact of the risk, it is simply incoherent to talk about A's rights against B, since there is no meaningful constraint associated with them on B. Once B creates a risk of some kind, though, to A, then a right arises and, with it, a meaningful constraint on B's actions: B will be required by the right to take some appropriate level of care, forming and acting on intentions, in the context of the risky activity, that are appropriately constrained by the risk.

The advantage of this solution is that it allows rights to be meaningfully constraining while at the same time preserving the idea that acting in a way that can harm others will generate obligations based on the rights of those others. This is because harmful actions, in order to actually occur, must pass through the relational stage of risk as a kind of transition from the absence of any relational features between, say, A and B (assuming there are no other features that link them) to the fact of B's harming A. Because a right will arise in that transitional relational stage, nothing is lost, for A or for the importance of rights in protecting persons, in thinking of rights in this way. We gain something, though, on this way of thinking of them, because a right's constraint will always be meaningful, on

this account, thus correcting, to some degree, for the tendency of rights to proliferate to the point of meaninglessness – as they do on non-relational views.

Another advantage of this approach is that it allows us to conceive of the kinds of negative rights that arise in risk settings as the same kind of thing, conceptually speaking, as rights arising in thicker relational settings that might give rise to the positive forms of interaction associated with the rights to health, say, or to subsistence. Moreover, it allows us to address the well-recognized difficulties associated with this latter group of rights, because it allows us to recognize the *interest* in health or subsistence to warrant the recognition of universal rights, but also to take those interests as being protected in different ways, by differently shaped constraints, in the different relational contexts in which they are at stake.

Fourth, we might object that the rights I have been arguing as differentiated relationally can simply be categorized as negative and positive. Here I want to suggest that we tend to confuse negative forms of obligation – negative forms of interaction – with general rights. I want to insist that ‘negative’ in respect of rights is not co-extensive with ‘general.’ Negative rights, on one hand, involve a certain type of constraint, namely, non-interference: my right to freedom of religion is widely conceived of as negative because it requires that others not interfere with my enjoyment of an interest in practicing my religion. Negative rights are distinct from positive ones, which require that someone *take* some action rather than refrain from doing so. Negative and positive are thus better described as *forms of interaction* required by rights rather than as demarcated different types of rights as different kinds of things.

Negative and positive are categories widely used to describe rights, but there is another distinction hovering in the background of some of this usage, it seems to me, that is similar but is not the same as the negative/positive feature of rights, namely, their categorization as general or special. General rights are ones we have prior to any action we might take. Special rights are ones that arise in the event of certain circumstances such as relationships and voluntary undertakings of obligation.

I do not subscribe to the idea that the rights on either side of these dichotomies are in fact different *kinds* of things, conceptually. Rather, I take my model of rights to imply that these distinctions are problematic and probably do not reflect different kinds of things. This is partly because many general rights require different things from different people, some of which will be negative and some of which will be positive in shape. Hart gives the right to free expression as an example of a general right, and, indeed, we take it to have a negative form. For the most part, all it requires of anyone is non-interference. But now consider my right to freedom of expression against my government. It will certainly require non-interference with my expression, but it may also require that the state do certain things to promote and facilitate the equal right of everyone to have the opportunity to express themselves. It may, in other words, sometimes require that the state create a ‘platform’ for speech, in some limited cases. Similarly, the right may take a different, more positive shape in certain types of other relational settings, such as that of a student and teacher, employee and employer, where it might require, for example that the teacher, employer, or other type of representative, take positive steps to create avenues for expression or an atmosphere that is enabling to expression.

Negative and positive forms of interaction, then, can be required by both general and special rights. And insofar as I am suggesting a model of rights in which they only arise in the context of some degree of relationality, however thin it may be, the model looks as though it will understand all rights as special in that sense. But my right to certain positive measures against my parents, for example, to promote my interest in free expression, does not require that *I* do anything in order for it to come about. For the *right-bearer*, all these rights are still ‘general’ in the sense that they arise differently in different relational settings without him or her having to do anything to acquire them. It is for this reason that the usefulness of the general/special distinction seems limited for a conceptual model of rights.

Fifth, one might object that the relational model of rights encourages morally unacceptable partiality. In response, I want to accept that the relational model might actually force us to think about relations (and partiality) in the opposite way: we sometimes ask why we are justified in prioritizing the ‘thicker’ demands of those with whom we have relationships when there are many more people who

have rights in respect to us (rights to aid, for instance, or, more generally, to minimal beneficence) that are in some sense more fundamental than the welfare rights of our own children that require more onerous or anyway more extensive actions on our part, such as providing music lessons, correcting crooked teeth, and paying for decent haircuts. Surely, in other words, the rights of children in Haiti who are living in tent slums after the earthquake to aid must take priority on our resources. Their rights are more basic, their needs more urgent, than those of our own children. Only selfishness, so this kind of argument goes, is at work in our partial prioritization of our own children's welfare rights against us over those of the Haitian children.

Now this seems an upsetting outcome: a model of rights ought to explain the moral intuition I have that I must do more for the Haitian children – even if I am entitled to do some unique things for my children – than the negative requirements of respect and its attendant demand of non-interference imply. I accept this, though, as a general normative statement; but on my model of them one *could* conceptualize the rights of the Haitian children *as* rights – the only requirement of *my* model is that one must be clear, in doing so, what the normatively relevant relational features that bind me to those children are, and what norms – and thus what shape of constraint – those features give rise to.

Finally, in response to some objections of this latter kind, I would simply say that I do not take a theory of rights to be a theory of morality – this I have in common with many, if not most, rights theorists. Rights describe some, but not all, of our moral reasons. I can have non-directed obligations to help those in need, for example, which I must satisfy. The objection to this type of position I take to be that a moral theory ought to tell me how to spend my various types of resources; so if it differentiates perfect from imperfect duties, for example, and it also tells me to prioritize the obligations in respect of the perfect ones over the imperfect ones, then it is a satisfying account because it can, to put the matter crudely, tell me what to do.

However appealing this kind of tidy and orderly moral system seems, it also seems clear that we do not need it to make most of our moral calculations: it is not usually going to be the case that I must decide between meeting my children's needs, as their rights require me to do, and promoting their welfare to some appropriate degree, and providing some measure of assistance to the Haitian children. Rather than giving me a comprehensive set of instructions about what to do, a general moral theory that includes rights, but is not exhausted by them, can function as a kind of guide for a moral division of labor so that we understand my children's moral call on me in terms of rights, and we understand the Haitian children to share a right to non-interference with everyone, but also to require some measure of assistance from everyone, so that, in the end, the various demands of morality are appropriately distributed and met.

Conclusion

We need to consider three things before we can recognize or impose a right. We need to know, first, what the putative right would protect – is it an interest important enough to warrant the strong, directed obligation associated with rights? Second, we need to know whom it would bind or constrain. Discovering the person or persons who will bear the obligation associated with it allows it to operate in this strongly constraining way, converting a statement about something important, and a reason for action of unspecified strength, weight, and orientation or directedness, into a strong reason for action for the obligated party with respect to the protected party. We also need to know, third, what *kind* of constraint the right will involve: will it require the other party to avoid some threatened or impending interference with the right-holder's interest? Or will it require that the right-holder be treated in a more specific way – ie, be given some more precise consideration or some resources, or be treated with a certain type of attitude. If I think the practice of religion is important, then I will recognize that individuals have rights in relation to that interest that involves constraints on others; but the more specific content of the rights, and in particular the shape the constraints take, will depend on the relational setting in which I want to recognize the right.

This means that rights, in my model, always reflect *three* normative judgments, rather than only one. The content of a right will be informed by normative judgments about the importance of a given interest, about the appropriateness of a given constraint, and about the normative importance of the relational context in which the purported right arises.

